APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Stamped "FILED JAN 09 2003 LEONARD GREEN, Clerk"

No. 01-3719

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NAJWA BAKAL,	)
	)
Plaintiff-Appellant,	) ON APPEAL
	) FROM THE
v,	) UNITED STATES
	) BOARD OF
JOHN ASHCROFT, Attorney General,	) IMMIGRATION
and IMMIGRATION AND	) APPEALS
NATURALIZATION SERVICE,	)
	) OPINION
Defendant-Appellees.	)
	)

Before: **MERRITT and GILMAN, Circuit Judges; and TARNOW, District Judge.***

ARTHUR J. TARNOW, District Judge. Najwa Bakal was ordered deported *in absentia* by a United States Immigration Court after failing to appear for her deportation

---

* The Honorable Arthur J. Tarnow, United States District Court Judge for the Eastern District of Michigan, sitting by designation.

hearing. The Board of Immigration Appeals (BIA) of the Immigration and Naturalization Service (INS) refused to consider Bakal's appeal because a statute and an INS regulation establish that the exclusive means for appealing an *in absentia* deportation order is to file a motion to reopen the proceedings with the Immigration Court. Bakal appeals the BIA's refusal to examine the Immigration Court's *in absentia* deportation order. For the reasons set forth below, we **AFFIRM** the decision of the BIA.

I. BACKGROUND

A. Factual Background

Petitioner Najwa Bakal is a citizen and native of Iraq who entered the U.S. as a visitor for pleasure on or about march 28, 1993. On August 26, 1994 she pleaded guilty to First Degree Retail Fraud in Michigan (Mich. Com Laws Ann. § 750.356c, theft of merchandise valued at greater than $1000), for which she was admitted to a youthful trainee program and sentenced to probation. When she sought lawful permanent resident status with the INS on September 30, 1995, she indicated on her application that she had not "been arrested, cited, charged, indicated, fined, or imprisoned for breaking or violating any law or ordinance." On March 7, 1996, Bakal was adjusted to lawful permanent resident status by the INS.

B. Procedural Background

On October 14, 1999, Bakal was charged with being removable by the INS on three counts: 1) that at the time of her adjustment to lawful permanent resident status, she had been convicted of, or had admitted to committing a crime of moral turpitude (8 U.S.C. § 1227(a)(1)(A) and 8 U.S.C. § 1182 (a)(2)(A)(i)(I); 2) that within five years after her admission to the U.S., she was convicted of a crime

involving moral turpitude (8 U.S.C. § 1227(a)(2)(A)(i)); and 3) that at the time of her adjustment of status, she was inadmissible because she willfully misrepresented a material fact on he adjustment of status application (8 U.S.C. § 1227(a)(1)(A) and (8 U.S.C. § 1882(a)(6)(C)(i)).

On February 16, 2000, a removal hearing was held by an Immigration Judge (IJ) wherein Bakal denied the charges of removability. This hearing was continued to July 12, 2000, and continued again to August 18, 2000. The IJ instructed Bakal at the February and July hearings that her failure to appear at the next scheduled continuation would result in an order of her deportation.

Bakal failed to attend the August 18, 2000 hearing. At this hearing, based on evidence submitted by the INS, including Bakal's signed plea to the retail fraud charge, the IJ ordered her deported to Iraq. The IJ's written decision states that Bakal had previously conceded her removability, that the INS had submitted documentary evidence establishing the truth of its factual allegations, and that Bakal's absence constituted an abandonment evidence establishing the truth of its factual allegations, and that Bakal's absence constituted an abandonment of her applications. On August 31, 2000, Bakal appealed the IJ's decision to the BIA, asserting that the record did not support a finding that she had been convicted of a crime of moral turpitude nor that she had engaged in fraud or misrepresentation of a material fact. On May 31, 2001, the BIA issued a per curiam order stating that it was precluded by statute from considering the appeal under 8 U.S.C. § 1229a(b)(5)(C). The BIA cited relevant BIA caselaw, noting that it required the Petitioner to file a motion to reopen with the IJ. On June 27, 2001, Bakal filed the instant appeal for review of the BIA's final decision not to examine the *in absentia* deportation order. On June 28,

2001, Bakal filed a motion for stay of deportation with this Court, which was granted on August 14, 2001.

II. JURISDICTION, SCOPE AND STANDARD OF REVIEW

This Court has jurisdiction to review the final decision of the BIA pursuant to 8 U.S.C. § 1252. We review questions of law in a deportation order de novo. *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001). The Court will uphold the decision of the BIA if there is reasonable, substantial, and probative evidence in the record supporting the decision. *INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992); *Koliadà v. INS*, 259 F.3D 482, 486 (6th Cir. 2001).

III. ANALYSIS

A. Under statute, INS regulation, and associated caselaw, the BIA did not err in denying review of the *in absentia* order of deportation

As part of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C) governs the process for seeking a recission of an order deporting an alien *in absentia*. This statute states:

> Such an order may be rescinded only–
> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or
>
> (ii) upon a motion to reopen filed at any time

> if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

8 U.S.C. § 1229a(b)(5)(C).

The obvious negative implication of the above statute, i.e., that the BIA will not hear appeals or removal orders rendered *in absentia*, is further clarified by INS regulation: "[A]n appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of removal entered *in absentia*" 8 C.F.R. § 240.15. In addition, BIA caselaw clearly interprets the rule concerning *in absentia* removal orders where notice of the hearing was provided:

> Such a removal order may be rescinded if a motion to reopen is filed with the Immigration Judge within 180 days after the date of the order of removal and if the alien demonstrates that the failure to appear was because of exceptional circumstances.
>
> *Matter of Guzman*, Interim Decision 3392 (BIA 1999) (citing 8 U.S.C. § 1229a(b)(5)(C)(i).

The record indicates that on August 18, 2000, Bakal was ordered deported *in absentia* by the IJ. Petitioner nowhere contends that her failure to appear was because of exceptional circumstances. The record reflects that clear

notice of the hearing had been provided to her as well as the consequences of a failure to attend. Bakal does not contend that she did not receive notice of the August 18, 2000 removal proceeding. She also does not allege that she was in custody at the time of the hearing. Therefore, under 8 U.S.C. § 1229a(b)(5)(C), the BIA did not have authority to hear her appeal. The BIA's decision not to evaluate Bakal's appeal was proper as per statute, regulation, and caselaw, as was its indication that a motion to reopen would have been the appropriate course.

B. The BIA did not deny Procedural Due Process when it denied review of the Immigration Court's valid order entered after Bakal was afforded the opportunity of a fair hearing

Bakal contends that she has been denied Procedural Due Process because the underlying order of the Immigration Court is materially defective and she has been denied the right of review by the BIA. However, an examination of relevant Due Process standards shows that there is no violation in the proceedings below.

The Supreme Court has long held that once an alien has been admitted to lawful residence, Procedural Due Process mandates that "not even Congress may expel him without allowing him a fair opportunity to be heard." *Kwon Hai Chew v. Colding*, 344 U.S. 590, 598 (1953); see also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (recognizing a Fifth Amendment right in deportation proceedings). The requirement of "a fair opportunity to be heard" is echoed in the Sixth Circuit, *E.g.*, *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975); *Sad v. INS*, 246 F.3d 811, 819 (6th Cir. 2001). *See generally Detroit Free Press v. Ashcroft*, 303 F. 3d 681, 687-690 (6th Cir. 2002). Other Circuits have directly addressed the issues of *in*

absentia deportation and Due Process, finding accord where a fair hearing has been offered. *E.g., Maldonado-Perez v. INS*, 865 F.2d 328, 333 (D.C. Cir. 1989) ("An *in absentia* deportation is legitimate if the alien had a reasonable opportunity to be present and failed to provide reasonable cause for his absence."); *Shah v. INS*, 788 F.2d 970, 972 (4th Cir. 1986) (affirming an *in absentia* deportation order where the alien had reasonable opportunity to attend the hearing); *Patel v. INS*, 803 F.2d 804, 806 (5th Cir. 1986) ("The fact that the hearing was held *in absentia* is not *per se* violative of due process.").

Bakal was given a fair opportunity to be heard at her deportation hearing. Her claim of a denial of Due Process simply ingnores (sic) the reality that she failed to attend her own hearing. Generally, we are dubious of an alien's claim of violation of Procedural Due Process where the deportation order is entered because the alien has failed to attend her deportation hearing for less than exceptional circumstances. In such an instance, the alien has simply failed to prosecute her own case. The resulting *in absentia* order is akin to a default judgment. However, we do not comment here on issues of Due Process that might arise in the scenario where the government's charges or proofs of removability are clearly and materially defective. Such a case is not before us.

On the facts of this case, Bakal cannot successfully assert that the underlying decision of the IJ is materially defective for failing to meet the required "clear, unequivocal, and convincing" evidentiary standard for proving removability, 8 U.S.C. § 1229a(b)(5)(a). The INS did in fact submit sufficient evidence supporting the IJ's finding as to the charge against Bakal under 8 U.S.C. § 1227(a)(1)(A) and 8 U.S.C. § 1182(a)(2)(A)(i)(I). Together, these provisions render inadmissible an alien who is "convicted of, or who

admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude." 8 U.S.C. § 1182(a)(2)(A)(i)(I). The record includes a copy of Bakal's plea of guilty to First Degree Retail Fraud, which was admitted into evidence at the August 18, 2000 hearing. This plea is signed by Bakal and states "I took merchandise from Lord & Taylor. I did not pay."

Theft is considered a crime of moral turpitude. *Matter of Grazley*, 14I. & N. Dec. 330, 332, available in 1973 WL 29441 (BIA 1973) (finding theft involves moral turpitude when a permanent taking is intended); Matter off Lopez-Meza, Int. Dec. 3423, available in 1999 WL 1223810 (BIA 1999). Bakal's plea document, along with other documents related to her criminal proceedings, stand as "clear, unequivocal, and convincing" evidence that she admitted committing a crime, or acts constituting material elements of a crime involving moral turpitude. Thus, the INS has adequately proven at least two of the three independently sufficient criteria of inadmissibility under 8 U.S.C. § 1227(a)(1)(A) and 8 U.S.C. § 1182(a)(2)(A)(i)(I). The IJ's order of deportation therefore stands on solid legal and factual grounds. Any conceivable Due Process concerns are allayed by the validity of the underlying decision of the Immigration Court.

IV. CONCLUSION

For the reasons set forth above, we **AFFIRM** the decision of the BIA not to review the Immigration Court's valid *in absentia* order that Petitioner be deported to Iraq.

APPENDIX B

No. 01-3719
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
AUG 14 2001
LEONARD GREEN,
Clerk

NAJWA BAKAL,

Petitioner,

v.

JOHN ASCROFT, Attorney General; IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ORDER

Before: KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

The petitioner, Najwa Bakal, seeks review of a ruling by the Board of Immigration Appeals dismissing her appeal from an immigration judge's *in absentia* order of removal. The Board ruled it lacked jurisdiction to consider the appeal. The petitioner now moves to stay her removal pending disposition of her petition for review. The INS opposes a stay and moves to dismiss the petition. The petitioner has filed a response in opposition to dismissal and in support of a stay.

The INS moves for dismissal on grounds that Bakal has failed to exhaust her administrative remedies. *See* 8 U.S.C. 1252(d)(1) (A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right). According to the

INS, Bakal could challenge the immigration judge's *in absentia* removal order only by filing a motion to reopen under 8 U.S.C. 1229a(b)(5)(C). This section provides that an order of removal may be rescinded upon a motion to reopen if the alien demonstrates exceptional circumstances for failing to appear or lack of notice. However, in her response, Bakal asserts that the remedy of filing a motion to reopen is not available to her. She affirmatively states that "[a]t no time throughout the proceedings has [she] ever asserted that she failed to appear at her hearing because of exceptional circumstances or lack of notice." To require her to file a motion to reopen prior to seeking review of the Board's order dismissing her appeal would be pointless. *See Ohio v. Roberts*, 440 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act."). Whether the Board was correct in determining it lacked jurisdiction to decide the appeal is an issue which will be addressed by the panel assigned to decide the merits of the petition.

Turning to the issue of Bakal's entitlement to a stay, the INS cites 8 U.S.C. 1252(f)(2) for the proposition that an order of removal may be enjoined only upon a showing "by clear and convincing evidence that entry or execution [of the removal order] is prohibited as a matter of law." The Ninth Circuit has, however, held that 1252(f)(2) does not limit the power of federal courts to grant stays of removal based on the traditional standards for granting a stay. *Andreiu v. Ashcroft*, 252 F.3d 277 (9th Cir., 2001). The factors to be considered by the court in determining whether a stay pending appeal should issue are: 1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (1991). Upon

consideration of these factors, we conclude that a stay of removal is warranted.

The INS's motion to dismissed is **DENIED**. The petitioner's motion for a stay of removal pending disposition of her petition is **GRANTED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX C

U.S. Department of Justice — Decision of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22401

File: A70-267-719 - Detroit — Date: May 31, 2001

In re: BAKAL, NAJWA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Owen, Charles S., Esquire

ON BEHALF OF SERVICE: Mark J. Jebson

ORDER:

PER CURIAM. On August 18, 2000, the Immigration Judge issued a decision ordering the respondent removed after the respondent failed to appear at a scheduled hearing. The respondent seeks to challenge the Immigration Judge's decision, but has done so by filing an appeal with the Board, rather than by filing a motion to reopen with the Immigration Judge in accordance with section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5)(C). Under these circumstances, the record will be returned to the Immigration Court without further Board action as we are precluded by the Act from considering such an appeal. *See Matter of Guzman*, Interim Decision 3392 (BIA 1999).

Accordingly, the record is returned to the Immigration Court.

/s/ signature illegible
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DETROIT, MICHIGAN

IN THE MATTER OF:
BAKAL, NAJWA DATE: Aug 18, 2000

CASE NO. A70-267-719

RESPONDENT IN REMOVAL PROCEEDINGS

DECISION

Jurisdiction was established in this matter by the filing on the Notice to Appear issued by the Immigration and Naturalization Service, with the Executive Office for Immigration Review and by service upon the respondent. See 8 C.F.R. sections 3.14(a), 103.5a.

The respondent was provided written notification of the time, date and location of the respondent's removal hearing. The respondent was also provided a written warning that failure to attend this hearing, for other than exceptional circumstances, would result in the issuance of an order of removal in the respondent's absence provided that removability was established. Despite the written notification provided, the respondent failed to appear at his/her hearing, and no exceptional circumstances were shown for his/her failure to appear. This hearing was, therefore, conducted *in absentia* pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act.

[✓] At a prior hearing the respondent admitted the factual allegations in the Notice to Appear and

conceded removability. I find removability established as charged.

[✓] The Immigration and Naturalization Service submitted documentary evidence relating to the respondent which established the truth of the factual allegations contained in the Notice to Appear. I find removability established as charged.

I further find that the respondent's failure to appear and proceed with any application for relief from removal constitutes an abandonment of any pending applications and any applications the respondent may have been eligible to file. Those applications are deemed abandoned and denied for lack of prosecution. See Matter of Pearson, 13 I&N Dec. 152 (BIA 1967); Matter of Perez, 19 I&N Dec. 433 (BIA 1987); Matter of R-R-Interim Decision 3182 (BIA 1992).

ORDER:
The respondent shall be removed to IRAQ or in the alternative to on the charge(s) contained in the Notice to Appear.

/S/ ELIZABETH A. HACKER
Elizabeth A. Hacker
Immigration Judge

cc: Assistant District Counsel
Attorney for Respondent/Respondent Z1

SSS

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of File A 70 267 719

NAJWA BAKAL, Respondent

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before ELIZABETH A. HACKER, Immigration Judge

Date: February 16, 2000 Place: Detroit, Michigan

Transcribed by DEPOSITION SERVICES, INC., At Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Immigration and Naturalization Service:	For the Respondent
Kathleen Alcorn, Esquire	Charles Owen, Esquire

PAL

JUDGE FOR THE RECORD
This is a removal proceeding in the matter of Najwa Bakal, file A 70 267 719. Let the record reflect the respondent is present before Immigration Judge Elizabeth A. Hacker on February 16th, 2000, Government counsel is Kathleen Alcorn, it's the date and time set for this initial master calendar here in Detroit, Michigan.

JUDGE TO MS. BAKAL

Q. Good morning, Ms. Bakal.

A. Good morning.

Q. What language do you speak best?

A. I speak English but (indiscernible).

Q. Are you comfortable today proceeding in English?

A. Yes.

Q. I'm going to ask you to speak up just a little bit because that fan is just a touch loud for me.

A. Okay.

Q. What's your address in the United States?

A. 27016 Arden Park.

JUDGE TO MR. OWEN

Q. And, Mr. Owen, I show an address in Bloomfield on a different roady.

A. We did submit a change of address with the, with the –

Q. Oh you did, yes you did, it just didn't get

PAL

entered.
JUDGE TO MS. BAKAL
Q. And you appear to day with attorney Charles Owen,
do you wish Mr. Owen to be your attorney and speak for you?
A. Yes.
Q. All right.
JUDGE TO MR. OWEN
Q. And, Mr. Owen, on behalf of the respondent will you
acknowledge receipt of the Notice to Appear in this case, which
is dated October 15th, 1999, was issued, of course, being on the
respondent?
A. Yes, Your Honor.
Q. Do you claim, on behalf of respondent, having
explained these matters to her, do you waive a statement of the
nature and purpose of these proceedings and advisal of rights and
a reading of the charges?
A. Yes, I do.
JUDGE FOR THE RECORD
Then I will mark and admit as Exhibit 1, then, the
Notice to Appear.
JUDGE TO MR. OWEN
Q. Mr. Owen, I assume you're comfortable with
respondent's proceeding in English?
A. Yes.
Q. We'll change it to English then. If witnesses are

PAL

needed in another language, of course, as always remind the Court. How do you answer the factual allegations under subsection 3 in the Notice to Appear, numbered one through seven, and the two charges of removal under (indiscernible), strike that, three charges of removal under Section 237 (a) (1) (A), 237 (a) (2) (A) (i), and 237 (a) (1) (A) of the Act?

A. Your Honor, the respondent would admit allegations one, two, three, and six, and deny four, five, and seven, and consequently would deny all charges.

Q. Deny all charges.

JUDGE TO MS. ALCORN

Q. Ms. Alcorn?

A. Your Honor, we present to you, I apologize, there's a stain on the Service (indiscernible), Your Honor, I tried, also a 213 and –

Q. A mishap with coffee.

A. And an I-45 before (Indiscernible).

JUDGE TO MR. OWEN

Q. Mr. Owen, do you want to take a moment and look at it?

A. Please.

JUDGE FOR THE RECORD

I'll mark for identification, then, as Exhibit 2, the

certified record of conviction in case number 9464357X consisting of a warrant, assignment to youthful trainee status, information

PAL

to return, that's a police entry card, and complaint, as Exhibit 3 for identification, and the 213.

JUDGE TO MS. ALCORN

Q. Also underneath that you have an application to adjust?

A. Yes, Your Honor.

JUDGE FOR THE RECORD

That will be Exhibit 4 for identification.

JUDGE TO MS. ALCORN

Q. Go ahead, Ms. Alcorn.

A. Your Honor, I'll submit to the Court that the conviction record establishes a conviction for allegation number four, I would note that it –

Q. All right, are you moving the admission of it?

A. Yes, Your Honor.

JUDGE TO MR. OWEN

Q. Mr. Owen, do you have any objections?

A. If I could take a moment just to review it? Your Honor, I have reviewed Exhibit 2 and have no objection to its admission.

JUDGE FOR THE RECORD

Strike that identification mark, it's admitted as a certified record of conviction of a Najol S-H-H-R-M-I-S.

JUDGE TO MS. ALCORN
Q. Okay, go ahead, counsel. Ms. Alcorn, he has no

objection to the admission of the –
A. Okay, Your Honor, I also move for the admission of the I-213, as well as the I-45, which I will note is signed by the respondent.
Q. I don't know who it's signed by, it's certainly signed with that name, but I don't know who, I cannot have, I do not have a signature of the respondent to compare it to, counsel, it would appear to be.
A. I think Mr. Owen will agree with that, his signature is also.
Q. We'll wait and see, Mr.
A. Mr. (indiscernible).
JUDGE TO MR. OWEN
Q. Mr. Owen?
A. I have no objection to Exhibit 4, the I-45, and again, I'll take a moment to look at the I-213, if I might?
JUDGE FOR THE RECORD
I'll admit the I-213.
MR. OWEN TO JUDGE
Q. I'm sorry, Your Honor?
A. I said I'll admit the I-213 since you have no objection.
Q. Your Honor, the respondent's assertion is –
A. Do you have no objection to the 45?
Q. I have, yes, Your Honor.

PAL

A. No objection?
Q. No objection.
A. All right, well let's see if the Government is finished then.
JUDGE TO MS. ALCORN
Q. All right, Ms. Alcorn, anything further?
A. No, Your Honor.
Q. That's it?
A. Under the definition of conviction under 101(a)(48)(A), the Government would submit that assignment to youthful training status is sufficient for a conviction as it's defined under the Act, respondent had to plead guilty and then was sentenced to probation and although that is not expunged, but the one that's, once she has successfully completed that probation, it is a, complete for the Court's purposes under the definition of conviction, it stands a conviction for the Immigration Service.
Q. I'm puzzled about one thing –
A. Yes, Your Honor?
Q. Ms. Alcorn. I have a conviction for a Najol from, somewhat misspelled, I have a 213 in that name, and I have the 45, which was, does not, well it appears that the respondent, on arrival, on the I-94, indicated that her name was Najoi Hermiz, the spelling is certainly different, H-E-R-M-I-Z, there's no

indication of any other names used by her, and the name, of

A 70 267 719 6 February 16, 2000
PAL

course, that appears on the Notice to Appear is Najwa Bakal –

A. Along with a.k.a

Q. Now I know –

A. Okay.

Q. Wait just a moment, please don't interrupt me.

A. No, Your Honor.

Q. We do have an a.k.a but you have laid nothing to link the Najoi Hermiz, other than listing it on the 862, to the individual convicted and the individual whose name appears on the 213.

A. Your Honor, I call the respondent to the stand to satisfy that.

Q. Well counsel, you've already rested and you were proceeding with your argument, I asked you if you had anything further. Do you wish to call the respondent at this time?

A. Yes, Your Honor.

JUDGE TO MS. BAKAL

Q. Ms. Bakal?

MR. OWEN TO JUDGE

Q. Your Honor, I think perhaps we can satisfy this issue and move onto (indiscernible) more substantive.

A. Do you acknowledge that your, that Ms. Bakal has

used the name of Najoi Hermiz?
Q. Yes, Your Honor.
A. As spelled on the conviction, and that the

conviction relates to her as does the 213?
Q. Yes, Your Honor.
A. All right. Very well then.
JUDGE TO MR. OWEN
Q. Go ahead, Mr. Owen.
A. Basically the respondent asserts that the assignment to a home youthful center, as presented by the Service, does not, not equate to a conviction under the Act, the Service has not established in the documentation that it has presented that the respondent made a plea, or in any way acknowledged the underlying facts that would be (indiscernible) to a conviction, and therefore the respondent's position is that the documentation presented by the Service does not establish a conviction.
JUDGE TO MS. ALCORN
Q. Ms. Alcorn?
A. Your Honor, I don't, I don't have with me, but I am familiar with the Michigan statute that does require under Michigan Homes Youthful Training Status that the respondent either admits sufficient facts or that the judge find that,

actually it's required that the respondent admit a plea of guilty to the criminal offense itself to be even assigned to that training status, and if the Court requires –

JUDGE TO MR. OWEN

Q. I am familiar with it as well, Mr. Owen, and the

statute, Homes Youthful Training Act does require it.

A. The statute may require it, Your Honor, but there's no, there is no evidence here that it occurred, and I don't believe that it can be properly inferred that it took place.

Q. Well I think that I can infer, however, that the parties have consented to the assignment of defendant to youthful trainee status. One of the conditions of youthful trainee status, under the statute, is an admission of eligibility.

A. Then I would assert that if it's an essential element it needs to be established by the Service not inferred by the Service.

MS. ALCORN TO JUDGE

Q. Your Honor, I don't mean to infer it at all, it's required under the statute and I don't have a copy of the statute but I would ask the Curt to take judicial notice of a criminal statute in Michigan in which we sit, not in our jurisdiction, but in the state that we sit in, and I know this Court is

familiar, I
18 am very familiar, and if the Court wants time, I could get a copy
19 of that for the Court, but I don't think that's necessary.
20 A. Okay.
21 MR. OWEN TO JUDGE
22 Q I'm not arguing the statute, Your Honor, I'm
23 arguing the documentation presented by the Service.
24 MS. ALCORN TO JUDGE
25 Q. Your Honor, I will submit to the Court that I have

1 presented to this Court and to Mr. Owen that the respondent
2 requested and was eligible to apply and was in fact applied for
3 and granted youthful training status, you had to admit the crime
4 in order to be granted that status. Now, had she not admitted
5 the crime, she may have gone to trial and found not guilty,
6 that's not what she did.
7 MR. OWEN TO JUDGE
8 Q. Again I'll reiterate, a plea, my assertion is the
9 establishment of a plea is an essential element and if the
10 Service doesn't present the plea, it can't simply rely on the
11 fact that a plea should have been taken under this statute, it
12 needs to establish that a please was taken under the statute, there
13 is nothing here to establish a plea other than an inference that

the statute was properly compiled with.
A. All right, counsel, I'm going to set this over briefly, until the end of the attorney docket, so counsel for the Government can provide me with the statute to complete the record and I'll rule at that time.
(OFF THE RECORD)
(ON THE RECORD)
JUDGE FOR THE RECORD
We're back on the record following a morning recess.
JUDGE TO MR. OWEN
Q. Mr. Owen?
JUDGE FOR THE RECORD

I'm marking as, and admitting as Exhibit 4, then, a copy of Assignment to Youthful Trainee Status.
MS. ALCORN TO JUDGE
Q. I think that's Exhibit 5, Your Honor, (Indiscernible).
A. Oh, you're right, it's Exhibit 5, the, I have them out of order. Thank you.
JUDGE TO MR. OWEN
Q. I'll give you a moment to look at that, Mr. Owen, since you've been served with it as well.
MS. ALCORN TO JUDGE
Q. If I may also draw the Court's attention, and Mr. Owen's attention, to footnote seven, I didn't get a chance to get the case, but - -
A. People v Dash?
Q. Yes, Your Honor.

JUDGE TO MR. OWEN
Q. Mr. Owen?
A. No objection to the admission of the statute, Your Honor.
Q. And I'm sure that your (indiscernible) does not change your posture in that the Service has not shown that such a plea was entered. Right?
A. That's correct, Your Honor.
Q. All right. And will you be seeking any forms of

relief, Mr. Owen? Let me indicate that while this is not a, obviously not an order, but will be reiterated in any final order I think that the statute coupled with the Michigan case law on this, and the fact that the record of conviction does indicate that the elements necessary to assign the respondent as defendant to the Homes Youthful Training Act were met, that the Court may reasonably find that the Court acted in accord with the governing statute and law, and all conditions were met. I will move for an expand on that, so I will ask you, do you designate a country to which removal is directed?
A. Your Honor, I would not at this time.
Q. All right.

A. I do believe that there's a secondary issue relating to the charge of misrepresentation and whether the intent to, whether the service has established intent, and I believe that would require a separate - -

Q. Finding on that?

A. Yes, Your Honor.

Q. All right. The 485 indicates, on the face of it, all right, and Mr. Owen, do you have any argument with respect to question number one on the 485? You have acknowledged that this is the respondent's signature?

A. I have not, Your Honor, but I would like the opportunity to present witnesses regarding her understanding of the Homes Youthful Assignee Act and also her understanding of the

PAL

English language at that time.

Q. Well, we do have a master calendar right now.

A. I understand, Your Honor.

Q. Let's see what we've got for a hearing on that issue.

JUDGE TO MS. ALCORN

Q. Is the Government going to present any witnesses?

A. Your Honor, the, I'm not sure as of yet, the examiner who adjudicated this is not in Detroit anymore, and I'm really not sure where she is, so.

Q. Is July 12th enough time to see if you can locate

her?
A. Oh yeah, that's fine, Your Honor.
JUDGE TO COUNSEL
Q. July 12th at 4 o'clock on the issue of deportability.
MR. OWEN TO JUDGE
Q. And if I were to submit a memorandum regarding my position regarding homes, would that be agreeable, before that date?
A. That's fine, that's fine.
JUDGE TO MS. ALCORN
Q. The Government can submit their as well if they wish, all right?
A. Thank you, Your Honor.

A 70 267 719 13 February 16, 2000
PAL

JUDGE TO COUNSEL
Q. Please ensure that everything compiles with the local operating procedures in terms of submission of witness lists and so on.
JUDGE TO MS. BAKAL
Q. Ms. Bakal, you must return on July 12th, 2000 at 4 o'clock in the afternoon. If you fail to appear, I have no choice but to order you removed and deported in your absence and unless your failure to appear was caused by exceptional circumstances beyond your control, such as your serious illness

or the serious illness or death of a close family member, you will not be eligible for certain relief under the Immigration law for a period of 10 years from that date. This includes future grants of voluntary departure, cancellation of removal, and the legal ability to change or adjust your immigration status while remaining in the United States. All right?

A. Okay.

JUDGE TO MR. OWEN

Q. Mr. Owen, since the, I will accept your brief on your position so the record is complete, but you can assume that it will have to be extremely persuasive. If you will be filing applications for relief, such as asylum or withholding, I will expect you to have it ready at that time to file. All right?

A. Very well, Your Honor.

Q. And Convention Against Torture, any explanations

you wish to make at that time vis a vie the failure to file within a year.

JUDGE TO MS. ALCORN

Q. Or evidence of filing if that is in the Government's file. All right?

A. Very good, Your Honor.

JUDGE FOR THE RECORD

All right, the matter is adjourned under the terms and conditions I've set.

HEARING CONTINUED

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of

File A 70 267 719

NAJWA BAKAL,
Respondent

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before ELIZABETH A. HACKER, Immigration Judge

Date: July 12, 2000 Place: Detroit, Michigan

Transcribed by DEPOSITION SERVICES, INC., At Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Immigration and Naturalization Service:

For the Respondent

Charles Owen, Esquire

PAL

JUDGE FOR THE RECORD
This is a continued removal proceeding in the matter of
Najwa Bakal, also known as Najoi Hermiz, file A 70 267 719. Let
the record reflect the respondent is present before Immigration
Judge Elizabeth A. Hacker sitting in Detroit, Michigan on July
12th, 2000 , this case was continued to allow the Government to
present evidence on the issue of the denied factual allegations
and the denied charges of removal. However, and we do have some
documents here, however, pursuant to an agreement of the parties,
we are going to continue the case for approximately 30 days to
allow some further investigation, and I will set this for August
18th , 2000 at 1 o'clock.
JUDGE TO COUNSEL
Q. Is that agreeable, Gentlemen?
A. (Trial attorney) Yes, Your Honor.
Q. Are you here?
A. Yes.
JUDGE TO MR. OWEN
Q. Mr. Owen are you?
A. August 18th, yes, I'm here.
Q. All right. We'll set it for 1?
A. 1? Okay, sure. Yes, that's fine, I was just thinking something else.
Q. All right, I'm going to make a note here that we

have discussed a possible withdrawal of the fraud charge on an agreement for voluntary departure, but the parties are going to investigate the likelihood of the respondent's returning to Canada as a landed immigrant, correct, Mr. Owen?

A. Yes, Your Honor.

Q. All right.

JUDGE TO MS. BAKAL

Q. Ma'am, you must return on August 18th, 2000. If you fail to appear, I have no choice but to order you deported in your absence, and unless your failure to appear was caused by exceptional circumstances beyond your control, like your serious illness or the death of a close family member, you will be barred from certain relief under the Immigration laws for 10 years, this includes voluntary departure, cancellation of removal, and the legal ability to change or adjust your immigration status while you remain in the United States. Do you understand?

A. Yes.

Q. All right.

JUDGE FOR THE RECORD

There being nothing further, well.

JUDGE TO MR. OWEN

Q. I'll have Shondra put on the notice and give it to

you at the window, Mr. Owen.
A. Thank you, Your Honor.
JUDGE FOR THE RECORD
And the cases stand adjourned.

PAL

(OFF THE RECORD)
(ON THE RECORD)

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of File A 70 267 719

)
) IN REMOVAL PROCEEDINGS
NAJWA BAKAL,)
)
Respondent)
) Transcript of Hearing

Before ELIZABETH A. HACKER, Immigration Judge

Date: [August 18, 2000] Place: Detroit, Michigan

Transcribed by DEPOSITION SERVICES, INC., At Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Immigration and Naturalization Service:

Mark Jebson, Esquire

For the Respondent

Charles Owen, Esquire

PAL

JUDGE FOR THE RECORD
This is a removal proceeding in the matter of Najwa Bakal, also known as Najoi Hermiz, file A 70 267 719. Let the record reflect it is 1:22 in the afternoon, the respondent is not present, this matter was set for 1 o'clock on today's date.
Present on behalf of the respondent is her counsel, Charles Owen, also on behalf of the Government is attorney Mark Jebson, this is, this case was set by notice to respondent's counsel and the respondent had been present previously at the last hearing on July 12th when this case was set over to, and advised by this Court of the consequences of her failure to appear. The Court would note that the respondent has admitted allegations one, two, and three on the Order to Show Cause, denied allegations four and five, admitted allegation six, and denied allegation seven. She has denied all three charges of removal, the case was set over to consider the respondent's arguments on issues in this case. The Government has previously submitted, as Exhibit 2, copies of the conviction record in this case, as Exhibit 3 the Form I-213, as Exhibit 4 a copy of the respondent's application for

adjustment
of status, filed with the Immigration Service in 1995, as Exhibit
5 a copy of the state statute on assignment to the so-called
Homes Youthful Trainees Act, that is the assignment of
individuals 17 to 21 to youthful trainee status, on the issue of
whether or not a conviction exists for immigration purposes.
I've reviewed these matters, considered it, and considering the

fact that the respondent, pursuant to statute, did enter a plea
of guilty to the conviction, the Court finds that the requisite
elements of 101(a) (48) have been met in her conviction and I
would further note that based upon the conviction, which occurred
as indicated in 1994, the respondent, in her application for
adjustment of status, did not disclose that on the application
and. Therefore, all of the charges of removal have been sustained
by the requisite standards of clear and convincing evidence, that
is the respondent did, under penalty of perjury, declare that she
had never been arrested or convicted, that was a material fact
since she was applying for adjustment of status, a

conviction
could have, would have led to the consideration of exclusion
under Section 212 (a)(2)(A)(i) of the Act if disclosed and, or
conceivably, and therefore the Court will find that all of the
factual allegations are sustained. The respondent, having failed
to appear, has failed to establish eligibility for any form of
relief, all forms of relief are deemed to be denied. The Court
has designated Iraq as the country to which removal will be
directed in an order consistent with this, a written order
consistent with this written order will be entered and that will
be ordering that the respondent be removed and deported from the
United States to Iraq on the charges contained in the Notice to
Appear. Both sides will be served with a summary decision, or
rather a written decision in this case, and the case is closed,
the record if completed.

A 70 267 719 20

PAL

(OFF THE RECORD)
(ON THE RECORD)
JUDGE FOR THE RECORD
Back on the record only very briefly. Since counsel
for the Government did point out to me that they did submit a

record of her plea of guilty.
JUDGE TO MR. JEBSON
Q. Counsel, I assume that you want that marked and admitted as an exhibit?
A. Yes, please, Your Honor.
JUDGE FOR THE RECORD
I'll mark and admit that as Exhibit 6, which also reflects the, in addition to the statute, the fact that the respondent has made a plea, entered a plea of guilty.
JUDGE TO MR. OWEN
Q. Mr. Owen, you've request that the Court consider your brief, I did review your brief in the matter and would have certainly given it a great deal of consideration had you, had your respondent appeared. Since it is a memorandum of law, however, it is not an exhibit, but it is in the record, sir.
A. Very good.
Q. All right.
JUDGE FOR THE RECORD
The matter is now closed, now, hopefully, complete
HEARING CLOSED

CERTIFICATE PAGE

I hereby certify that the attached proceeding before ELIZABETH A. HACKER in the matter of:

NAJWA BAKAL

A 70 267 719

Detroit, MI

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration review.

/s/ Patricia Lindenmuth

(PATRICIA LINDENMUTH, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

October 27, 2000

(Completion Date)

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

NAJWA BAKAL

Petitioner

v.

JOHN ASHCROFT, Attorney General; IMMIGRATION AND NATURALIZATION SERVICE

Respondents

FILED
FEB 28 2003
LEONARD
GREEN,
Clerk

Before: **MERRITT** and **GILMAN**, Circuit Judges; **TARNOW**, District Judge.*

Upon consideration of the petition for rehearing filed by the petitioner,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

* The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.